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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 231

ROBERT J. CLEARY, BY HIS FATHER AND NEXT FRIEND, MIKE CLEARY, SR.,

Petitioner,

vs.

INDIANA BEACH, INC., A CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Indiana Beach, Inc., respectfully requests that the Petition for Writ of Certiorari be denied.

QUESTIONS PRESENTED.

After a long period of deliberation by a jury in a diversity action for damages for personal injuries the federal trial court, in the absence of and without specific notice to the parties or counsel, permitted the jury to separate and disperse, in order to rest before continuing its deliberations. The jury was admonished not to talk to any one

about the case while separated and not to resume deliberations until the whole jury had reassembled. Petitioner's counsel learned of this procedure while the jury was separated and before it reassembled to continue its deliberations. He made no objection to the separation or to the resumption of the deliberations or to the returning of a verdict by the jury until a week after the verdict was returned, at which time he asserted in an Alternative Motion for a New Trial that the separation of the jury violated the trial by jury guaranteed by the Seventh Amendment to the Federal Constitution.

The questions presented are:

(1) Whether Petitioner properly raised and preserved the constitutional question for review.

(2) If so, whether in a civil action a federal trial court may, in its discretion, permit a jury to separate and rest and then resume its deliberations consistent with the Seventh Amendment, under circumstances where there is no claim or showing of prejudice to either party by reason thereof and no showing that the court acted arbitrarily in so doing.

STATEMENT.

Respondent adds to Petitioner's statement the following:

(1) Petitioner's counsel had actual knowledge before noon on July 15, 1958 (the day the verdict was returned) that the trial court had permitted the jury to separate at 4:00 o'clock that morning and that the jury was to resume its deliberations. (Appendix, pages 265 and 266.)

(2) Despite this knowledge and although having ample time and opportunity so to do, Petitioner's counsel made no objection to the separation of the jury, or to the resumption of the deliberations of the jury, or to the returning of a verdict by the jury.

(3) Petitioner's first objection to the separation was made a week after the verdict was returned in Petitioner's Alternative Motion for a New Trial wherein it was claimed for the first and only time that the separation of the jury offended the guarantee of the Seventh Amendment.

(4) Petitioner made no claim in his Alternative Motion for a New Trial, or otherwise, and offered no evidence to the effect that either party was prejudiced by the separation of the jury. Petitioner made no claim in the Court of Appeals and makes no claim in this Court of any such prejudice. Petitioner made no showing below that the trial court acted arbitrarily in permitting the jury to separate.

ARGUMENT.

The Court of Appeals held that there was no constitutional violation and, moreover, that Petitioner had not properly preserved for review the question of the alleged violation of the constitutional right to jury trial. As to the latter point, the record is clear and undisputed and the decision is supported by ample authority and good reason. Petitioner's counsel had full knowledge of the separation of the jury. He deliberately chose to make no objection to this procedure until after the verdict. Typical of the many cases holding that such knowledge and conduct precludes one from making a subsequent complaint is *Frances v. Southern Pacific Company*, 68 S. Ct. 611, 333 U. S. 445, 92 L. Ed. 798 (1948) in which petitioner contended for the first time in a motion for a new trial that he had been denied jury trial because of the improper selection of the jury panel. The Supreme Court refused to consider the merits of this contention and said with reference to the objection:

> "If not an afterthought, it is an effort to retrieve a position that was forsaken when it was decided to take a gamble on the existing jury panel. In either case the objection comes too late."

The reason underlying the requirement that procedural objections as well as other objections be timely made is that the trial judge should have an opportunity to consider and, if necessary, correct the action complained of. Thus, the Court of Appeals in the instant case properly held that since no timely objection was made so as to permit the trial judge to consider the question of the propriety of his action in permitting the jury to separate, the judgment was not assailable on that ground. This principle is par-

ticularly applicable where constitutional matters are involved and the rule has always been that such questions must be raised at the earliest opportunity.

Since the decision of the Court of Appeals is fully supported on the ground that the constitutional question was not properly raised or preserved, it is wholly unnecessary for this Court to consider the case. Indeed, it is the accepted practice of this Court to decide cases on non-constitutional grounds whenever possible.

Peters v. *Hobby*, 349 U. S. 331, 99 L. ed. 1129, 75 S. Ct. 790 (1955).

Communist Party of the United States of America v. *Subversive Activities Control Board*, 351 U. S. 115, 100 L. ed. 1103, 76 S. Ct. 663 (1956).

Respondent suggests that this principle is especially applicable in determining whether the court should or should not exercise its discretionary jurisdiction in a given case, for the availability of a non-constitutional ground of decision clearly shows the lack of any "special" or "important" reason for granting certiorari as those terms are used in Rule 19 of the Rules of the Supreme Court of the United States.

Turning, for the sake of argument, to the merits of the constitutional question itself, Respondent submits that even if it had been properly raised and preserved, it is not such a question as requires a review by the Supreme Court of the United States in the exercise of its discretionary jurisdiction. The decision of the Court of Appeals for the Seventh Circuit is not in conflict with the decision of any other circuit. On the contrary, every one of the six other circuits which has considered this question has reached the same conclusion as did the Seventh Circuit in the instant case and in four of those cases this Court denied certiorari.

Byrne v. *Matczak*, 254 F. 2d 525, 528-529 (3rd Cir. 1958), certiorari denied, 358 U. S. 816, 79 S. Ct. 24, 3 L. ed. 58.

Franklin v. *Shelton*, 250 F. 2d 92, 99 (10th Cir. 1957), certiorari denied, 355 U. S. 959, 78 S. Ct. 544, 2 L. ed. 2d 533.

Guardian Fire Insurance Co. v. *Central Collision Co.*, 194 F. 851, 853 (5th Cir. 1912).

Liverpool & London & Globe Ins. Co. v. *N. & M. Friedman Co.*, 133 F. 713, 716 (6th Cir. 1904).

Walton v. *Wild Goose Mining & Trading Co.*, 123 F. 209, 221 (9th Cir. 1903), certiorari denied 194 U. S. 631, 24 S. Ct. 856, 48 L. ed. 1158.

Bratcher v. *U. S.*, 149 F. 2d, 742, 747 (4th Cir. 1945) Cert. denied, 325 U. S. 885, 65 S. Ct. 1580, 89 L. ed. 2000.

Even if Petitioner had made a timely objection to the separation of the jury, the cases cited above hold that he would not be entitled to a reversal because the Federal District Courts have the discretionary power to permit temporary separations even after the case has been submitted to the jury. The cases also hold that separation of the jury is not a ground for a reversal unless the party complaining shows that he was prejudiced by the separation. In the instant case Petitioner made and makes no claim that the separation resulted in any misconduct on the part of the jury to the prejudice of the Petitioner. Petitioner stands on the mere fact that the jury was separated. The record shows that the jury was admonished to speak to no one about the case while separated and to recommence deliberations only when all jurors had returned to the Courthouse and were reassembled. It is presumed that the jury followed these instructions in the absence of any showing to the contrary.

Neither is the decision of the Court of Appeals of the

Seventh Circuit in conflict with any applicable decision of this Court. On the contrary, the decision is entirely consistent with the holding of this Court in *Galloway* v. *United States*, 319 U. S. 372, 87 L. ed. 1458 (1943). Petitioner's sole argument is that the common law concept of trial by jury prohibited separation of the jury during deliberations and that this aspect of jury trial was carried over into and must forever remain a part of the Seventh Amendment. But this Court held in the *Galloway* case that:

> "The (Seventh) Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common law system of pleading or the specific rules of evidence then prevailing."

The decisions of the trial court and the Court of Appeals are also in complete accord with the law of the State of Indiana, the governing substantive law in this case. For more than 100 years it has been the public policy of the State of Indiana to permit the separation of civil and criminal juries in the discretion of the trial court.

Barlow v. *State*, 2 Blackford's Reports 114, 116 (1827).

Haynes v. *Thomas*, 7 Ind. 38, 39 (1855).

Acts of General Assembly of Indiana, 1852, Revised Statutes, Vol. 2, Page 113; Burns Ind. Stat. Anno., 1946 Repl. Vol. 2, Part 1, Section 2-2016.

This public policy should be given great weight. The purpose and intent of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188 (1938) was to insure that in all cases where a federal court is exercising jurisdiction because of diversity of citizenship, the outcome of the litigation should be substantially the same, so far as legal rules determine the outcome of litigation, as it would be if tried in a state court. For this purpose abstractions re-

garding "substance" and "procedure" should be put aside.

Byrd v. *Blue Ridge Rural Electric Coop.*, U. S. 525, 550, 2 L. ed. 2d 953, 969-970, 78 S. Ct. 893 (1958).

CONCLUSION.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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